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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DEAN JOHN PERALTA, Defendant and Appellant.	F063222 (Super. Ct. No. F09902851) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Arlan L. Harrell, Judge.

William A. Malloy, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Jeffrey Grant, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Gomes, J. and Poochigian, J.

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INTRODUCTION

Appellant Dean John Peralta challenges the denial of his *Marsden* motion (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*)). We conclude that the motion was properly denied and will affirm the judgment.

FACTS

I. Proceedings in 2009.

On June 26, 2009, an amended information was filed charging appellant with one count of willful infliction of corporal injury on a cohabitant and two counts of attempting to dissuade a witness.[1] It was specially alleged that appellant had served one prior prison term. (Pen. Code, §§ 273.5, subd. (a), 136.1, subd. (a)(2), 667.5, subd. (b).)[2]

A pretrial hearing was held on September 24, 2009 (the pretrial hearing). The court asked counsel, "Have both parties exhausted any possibility of a resolution?" The prosecutor replied,

> "[T]he People's position in this case, the defendant would need to plead to a felony, concurrent with any parole violation. My understanding from defense counsel is that there are no new felonies that are alleged in the complaint that he would be willing to plead to, that he would like a misdemeanor offer. The People are not willing to give him a misdemeanor in this case."

The court asked defense counsel if the prosecutor's statement was "correct" and defense counsel replied, "Yes, Your Honor. He might be willing to plead to a misdemeanor in order to resolve this and not go through the trial. But I don't think he will be willing to plead to a new felony conviction."

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[1] It is unnecessary to set forth the factual circumstances of the offenses to resolve the issue presented in this appeal.

[2] Unless otherwise specified all statutory references are to the Penal Code.

The court asked the prosecutor "what is the exposure for Mr. Peralta in this case if he were convicted?"

The prosecutor replied, "The [section] 273.5 is two, three, four. So four years. He has a prison prior, so that adds one. So five. If you run both [section] 136's consecutive, one-third the midterm, eight months each charge. So it would come to six years, four months."

The court asked, "And when the People were suggesting that Mr. Peralta plead straight up to a felony, does it matter which felony?"

The prosecutor responded that "the People would be requesting [section] 136.1."

The court asked defense counsel, "Well, have you had adequate time, Mr. Meyer, to discuss with Mr. Peralta his exposure in this case and the People's most recent offer of a plea to a [section] 136.1, with a maximum exposure of three years?"

A discussion was held off the record between defense counsel and appellant. Then defense counsel said,

> "Your Honor, he is not willing to plead to that. I would say if there was a [section] 273.5 offered as a misdemeanor, he would be willing to plead to that. However, the possibility of [section] 136, reduced to a misdemeanor. But as a felony, that is a serious felony, and he is not willing to plead to that."

The court concluded the discussion by saying, "It is. I just want to be certain Mr. Peralta knows what he is looking at if there is a conviction. Then it sounds as if all parties have exhausted all possibilities of resolution."

Jury trial commenced the next morning. On September 30, 2009, the jury returned guilty verdicts on counts 1 and 2. Count 3 was dismissed on motion of the prosecutor. Appellant admitted the prior prison term allegation.

On October 30, 2009, appellant was sentenced to an aggregate term of four years eight months imprisonment, calculated as follows: the mid-term of three years for count

1, plus one-third the mid-term of two years for count 2, plus one year for the prior prison term enhancement.

Appellant appealed the judgment. (*People v. Dean John Peralta* (F059011).) He abandoned the appeal and it was dismissed.

II. Proceedings in 2011.

On July 26, 2011, the California Department of Corrections and Rehabilitation mailed a letter to the trial court stating that it may have erred when it sentenced appellant on count 2 because section 1170.15 required it to impose the full middle term.

A resentencing hearing on count 2 was held on August 29, 2011. The court imposed a consecutive two-year term for this offense.

Immediately after the sentence was imposed defense counsel said, "Your Honor, [appellant] has indicated to me, because I misadvised him on his full exposure, that he would not have chose to go to trial [*sic*]. So maybe we can have a Marsden hearing or something along that line."

The court replied, "Sure, we can have a Marsden hearing."

The court explained to appellant that a *Marsden* hearing is "made after a plea or a conviction if a defendant is making a claim that in some way counsel may not have been effective. And it sounds like, at least according to [defense counsel], that is the claim that you're making here, that he failed to advise you properly. Is that what you're claiming?"

Appellant replied,

> "Well, yeah. How could I make a decision about proceeding on any type of court proceedings if I don't know my exact exposure, all the evidence held against me. That is basically making a decision just, you know, with the wind blowing, in a sense of speaking. It is not on solid ground. I feel that I maybe could have made different decisions or actual one different decision if I knew, you know, what I was actually looking at. I mean, to just go into a trial not knowing what my maximum exposure is kind of ludicrous, if you ask me."

Appellant protested his innocence, saying "[M]y witness did come and testify that I didn't even commit this crime," and, "I honestly did not do this." Appellant also complained that his initial sentence was too long and increasing it was unfair. He claimed that the victim "abandoned" his children and said that he "was hoping to go home next week to be a father to my children."

The court asked appellant, "So what is your complaint as to [defense counsel], sir?"

Appellant replied, "Well, can we go to trial again? Because at least I know the maximum exposure now. Because after we did the whole thing, I basically went into something blind."

The court took a brief recess. Then it asked, "Anything else, Mr. Peralta?"

Appellant answered, "I would just like to comment on if I could have a chance at maybe a retrial." The court responded, "Well, that is not really an issue, sir. Remember, this is an issue dealing only with whether your current attorney should be replaced as your attorney of record. So is there anything else?" Defendant answered, "Well, yeah. I just don't understand if he was replaced, how would that possibly fix the fact that I was not notified of what I was walking into before a trial? I don't understand that part." The court again asked appellant, "Well, anything else, sir?" Appellant replied, "I guess that's it."

Defense counsel said,

> "… Your Honor, to be honest, I probably advised him based on what I knew at the time, before going into the trial, that his exposure was four years for the underlying, consecutive five, and he had two [section] 136's before the trial started. So those are eight months each. I probably told him it was four years, plus the 16 months. That was his exposure, I think, off the top of my head."

Discussion was held between the court and defense counsel concerning appellant's maximum prison exposure. Appellant said, "All I can say is I do have documentation. I

believe it was like five years, eight months, which is different than everything we've just heard."

Defense counsel said, "I'm sure the probation report said five years, eight months, his exposure, what he was convicted on, because of the prison prior on the eight months of the one count he was convicted on. So the maximum exposure would have been seven years."

The court asked appellant if he had any further comments. Appellant said, "I'm really confused. I guess not." Defense counsel did not have any further comments. The court said,

> "Well, again, the purpose of this hearing is to determine whether there has been ineffective assistance such that counsel should be removed as the attorney of record and whether there has been a breakdown of the attorney-client relationship to suggest that Mr. Meyer cannot effectively represent Mr. Peralta going forward. [¶] The Court doesn't find there has been any type of ineffective representation.…"

The court took a brief recess. When it returned, the court stated that it had examined "notes of what was said at the pre-voir dire conference." The court recited for the record the comments that were made during the pretrial hearing by defense counsel, the prosecutor and the court concerning appellant's maximum prison exposure and plea negotiations. Then the court ruled, as follows:

> "So the Court is satisfied that Mr. Peralta knew exactly what he was doing, that he was not intending to plead to any felony, even if he had been told that the [section] 136.1 would run full term -- full midterm consecutive. He wouldn't have taken it at that time because he made it very clear, through his counsel, that he wanted a misdemeanor, only a misdemeanor and nothing but a misdemeanor. Which was not forthcoming in this case. [¶] … The Marsden motion is denied."

DISCUSSION

Appellant asserts that he was misadvised by the prosecutor and the judge about his maximum prison exposure during the pretrial hearing. He further asserts that the

misadvisal violated his federal constitutional right to due process of law and the effect of this error is assessed under the standard for prejudice announced in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). Based on these factual and legal premises, appellant contends that the trial court erred when ruling on his *Marsden* motion because it did not apply the *Chapman* prejudice standard to assess the effect of the prosecutor's and the court's misadvisal.

Respondent acknowledges that appellant was misadvised about his maximum prison exposure. It argues that appellant bore the burden of demonstrating a reasonable probability that he would have accepted the plea offer if he had been properly advised. In respondent's view, the trial court properly denied the *Marsden* motion because appellant did not satisfy this evidentiary burden.

We agree with the parties that appellant was misadvised about his maximum prison exposure. His maximum prison exposure was nine years. The section 273.5 charge carried a maximum possible sentence of four years. (§ 273.5, subd. (a).) Each section 136.1 charge carried a two-year maximum sentence. (§§ 18, 136.1, subd. (a), 1170.15) The prior prison term enhancement carried an additional year. (§ 667.5, subd. (b).) Yet, during the pretrial hearing, the prosecutor said that appellant's maximum exposure was six years four months. The court did not independently calculate appellant's maximum exposure. During the *Marsden* hearing, defense counsel said that he probably misadvised appellant about his maximum exposure.

Appellant's argument that he is entitled to a new hearing applying the *Chapman* standard of review to assess the effect of the prosecutor's and the judge's misadvisal suffers from an insurmountable deficiency. As we will explain, the court did not decide the *Marsden* motion based on an incorrect legal standard. It is appellant who is raising a new legal claim that was not presented for decision below.

Appellant is appealing from denial of a *Marsden* motion. A *Marsden* motion is focused on the relationship between defense counsel and his or her client. The purpose of

a *Marsden* motion is to determine if a defendant is entitled to substitution of another attorney. Under the Sixth Amendment right to assistance of counsel, a defendant is entitled to substitution of counsel if the record clearly shows that the appointed attorney is not providing adequate representation or if the defendant and counsel have become embroiled in an irreconcilable conflict such that ineffective representation is a likely result. (*People v. Welch* (1999) 20 Cal.4th 701, 728.) As applicable here, "[w]ith a *Marsden* motion, the defendant is seeking a new lawyer on the ground his or her current attorney is providing ineffective assistance." (*People v. Percelle* (2005) 126 Cal.App.4th 164, 174.) The appellate court reviews the denial of a *Marsden* motion for an abuse of discretion. "'Denial is not an abuse of discretion "unless the defendant has shown that a failure to replace counsel would substantially impair the defendant's right to assistance of counsel."' [Citation.]" (*People v. Streeter* (2012) 54 Cal.4th 205, 230.)

In this case, the *Marsden* motion required the court to decide if appellant was entitled to substitute attorneys because defense counsel had not provided adequate representation due to his misadvisal about appellant's maximum prison exposure. The court correctly stated that a *Marsden* hearing "[deals] only with whether your current attorney should be replaced as your attorney of record." Appellant's claim that the prosecutor and the court violated his federal constitutional due process rights by misadvising him about his maximum prison exposure was not articulated, even in rudimentary form, by any one during the *Marsden* hearing. Neither defense counsel nor appellant made any remarks that could reasonably be construed as a claim that appellant's federal constitutional due process rights were infringed by the prosecutor's or the court's misadvisal. Defense counsel did not argue that the *Chapman* standard applied. Appellant did not file a motion for new trial or other post-conviction relief based on misadvisal by the prosecutor or the trial court. The claim that is presented on appeal was not raised in any fashion during the lower court proceedings.

Appellant's failure to assert below that his federal constitutional due process rights were infringed as a result of the misadvisal by the prosecutor and the judge, together with his failure to argue that the court must apply the *Chapman* standard of review to his *Marsden* motion, resulted in forfeiture of the issue presented on appeal. "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' [Citation.]" (*United States v. Olano* (1993) 507 U.S. 725, 731.) "Specificity is required … to enable the court to make an informed ruling on the motion …." (*People v. Mattson* (1990) 50 Cal.3d 826, 854.)

In any event, appellant's argument lacks merit. The record fully supports the trial court's factual finding that appellant "was not intending to plead [guilty] to any felony," even if he had been told that the sentence for the section 136.1 conviction would run "full midterm consecutive." There is nothing in the record before us indicating that appellant might have accepted the People's plea offer if he had been correctly advised by the prosecutor, the court or defense counsel that he faced a maximum prison exposure of nine years. During the pretrial hearing defense counsel unequivocally stated that appellant was only willing to plead guilty to a misdemeanor and would not accept a plea agreement that included an admission of guilt to a felony, particularly a serious felony such as a violation of section 136.1. During the *Marsden* hearing appellant did not say that he would have taken the plea bargain had he known that he faced a maximum of nine years' imprisonment. Rather, appellant insisted that he was innocent of the charges. When the court asked appellant to state his complaint about defense counsel, appellant replied, "Well, can we go to trial again?" Thus, the record affirmatively demonstrates that the misadvisal was not prejudicial, even when the effect of the misadvisal is assessed under the stringent *Chapman* standard of harmless beyond a reasonable doubt.

For both of these reasons, we reject appellant's claim of error and uphold the trial court's decision denying the *Marsden* motion.

DISPOSITION

The judgment is affirmed.